No. 00-507-CFX

Title: Chickasaw Nation, Petitioner
v.
United States
and
Choctaw Nation of Oklahoma, Petitioner
v.
United States

Docketed:
October 3, 2000

Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Oct 3 2000	Petition for writ of certiorari filed. (Response due January 2, 2001)
	Oct 24 2000	Order extending time to file response to petition until December 4, 2000.
	Dec 1 2000	Order further extending time to file response to petition until January 2, 2001.
	Dec 22 2000	Brief of respondent United States filed.
	Dec 29 2000	Motion of Shakopee Mdewakanton Sioux (Dakota) Community, et al. for leave to file a brief as amici curiae filed.
	Jan 3 2001	DISTRIBUTED for Conference of January 19, 2001
	Jan 4 2001	Opposition of petitioners to motion of Shakopee Mdewakanton Sioux (Dakota) Community, et al. for leave to file a brief as amici curiae filed.
	Jan 22 2001	Motion of Shakopee Mdewakanton Sioux (Dakota) Community, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 22 2001	Petition GRANTED. SET FOR ARGUMENT October 2, 2001. **********
	Feb 16 2001	Order extending time to file petitioner's brief on the merits to and including April 9, 2001. Order extending time to file respondent's brief on the merits to and including June 11, 2001.
	Mar 14 2001	Motion of petitioners to dispense with printing the joint appendix filed.
	Mar 16 2001	Motion of petitioner for leave to dispense with printing of the joint appendix DISTRIBUTED.
	Mar 19 2001	Motion of petitioners to dispense with printing the joint appendix GRANTED.
	Apr 4 2001	Brief amici curiae of Lower Sioux Indian Community of Minnesota, et al. filed.
	Apr 5 2001	Brief of petitioner Chickasaw Nation and Choctaw Nation of Oklahoma filed.
	Apr 6 2001	Brief amicus curiae of Muscogee (Creek) Nation filed.
	Apr 9 2001	Brief amici curiae of Seminole Tribe of Florida, et al. filed.
	Apr 9 2001	Brief amicus curiae of San Carlos Apache Tribe filed.
	Apr 9 2001	Brief amicus curiae of San Manuel Band of Serrano Mission Indians filed.
	Apr 9 2001	Brief amici curiae of Shakopee Mdewakanton Sioux (Dakota) Community, et al. filed.
	Jun 1 2001	Order further extending time to file respondent's brief

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No. 00-507-CFX

Entry	Date	Proceedings and Orders
		on the merits to and including June 21, 2001.
	Jun 21 2001	Brief amici curiae of Ledyard, North Stonington and Preston, Connecticut filed.
	Jun 21 2001	Brief of respondent United States filed.
	Jul 18 2001	Reply brief of petitioners Chickasaw Nation and Choctaw Nation of Oklahoma filed.
	Jul 25 2001	CIRCULATED.
	Sep 4 2001	Record filed.
	Sep 19 2001	Record filed.
	Oct 1 2001	Record filed.
	Oct 2 2001	ARGUED.

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No. 00-

IN THE

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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151 pp

QUESTION PRESENTED

Whether, under the applicable Indian-law canons of statutory construction, the Indian Gaming Regulatory Act, by 25 U.S.C. § 2719(d)(1)'s express incorporation of Chapter 35 of the Internal Revenue Code, confers on Indian tribes conducting gaming operations the same exemption from wagering taxes afforded to states by Chapter 35 of the Internal Revenue Code?

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Choctaw Nation of Oklahoma v. United States, 210 F.3d 389 (10th Cir. 2000), App. p. 29a.

Choctaw Nation of Oklahoma v. United States, 1999 WL 282779 (E.D. Okl. 1999), App. p. 33a.

The Chickasaw Nation v. United States, 1998 WL 975690 (E.D. Okl. 1999), App. p. 47a.

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The judgments for which review is sought were entered on April 5, 2000. The petitions for rehearing and suggestions for rehearing *en banc* were denied on July 5, 2000. (App. p. 66a.) This Petition is filed within the time allowed by law. 28 U.S.C. § 2101(c); Supreme Court Rule 13.3. Jurisdiction is based on 28 U.S.C. § 1254(1).

CITATION TO STATUTES INVOLVED IN THE CASE

25 U.S.C. § 2701
25 U.S.C. § 2702
25 U.S.C. § 2710
25 U.S.C. § 2719(d)(1)
26 U.S.C. § 4411
26 U.S.C. § 4412
26 U.S.C. § 4413
26 U.S.C. § 4414

26 U.S.C. § 4401	26 U.S.C. § 4421
26 U.S.C. § 4402	26 U.S.C. § 4422
26 U.S.C. § 4403	26 U.S.C. § 4423
26 U.S.C. § 4404	26 U.S.C. § 4424
26 U.S.C. § 4405	

(Statutory text set out in App. p. 68a, *et seq.*)

STATEMENT OF FACTS

The Chickasaw Nation and The Choctaw Nation of Oklahoma (the "Nations"), sovereign, federally recognized Indian Tribes, separately conduct pull-tab games pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and their own respective tribal ordinances. Those games are conducted exclusively on trust lands at facilities operated by the respective Nations. As required by IGRA, the tribal revenues from those operations are used exclusively for the respective Nations' governmental functions, consisting of legislative branch expenses, judicial branch expenses and executive branch expenses, including tribal nutritional, medical, educational and senior citizen programs. No tribal member of either Nation owns an interest in the particular Nation's gaming operations or is entitled to receive direct payment from the net revenues of the gaming operations.

The Internal Revenue Service assessed wagering and related occupational taxes pursuant to 26 U.S.C. §§ 4401 and 4411 against the Nations in connection with their pull-tab operations.

After satisfying the administrative prerequisites for a refund action, each Nation filed its separate action against the United States (the "Government") for a refund pursuant to 28 U.S.C. § 1346(a)(1) in the United States District Court for

the Eastern District of Oklahoma, seeking recovery of the wagering taxes paid for the month of July 1993, plus interest; occupational taxes for the year 1993, plus interest; and reasonable litigation costs authorized by 26 U.S.C. § 7430(a). Each Nation alleged that the taxes were erroneously and illegally assessed and collected. The Government filed its answer in each case denying that the taxes in question were erroneously and illegally assessed and collected. In each case, the Government amended its Answer to include a counterclaim for unpaid wagering and occupational tax assessments plus interest for periods additional to those addressed in the Complaints. The Nations replied by denying tax liability and alleging that the taxes assessed were illegal as applied to them.

The merits in each case were addressed by cross motions for summary judgment. In each action the District Court then entered judgment against the particular Nation and in favor of the Government.

The Nations separately appealed to the United States Court of Appeals for the Tenth Circuit. In their appeals, the Nations asserted that IGRA, particularly 25 U.S.C. § 2719(d) (entitled "Application of the Internal Revenue Code of 1986"), provided Indian tribes with the same wagering tax exemption afforded by Chapter 35 of the Internal Revenue Code, 25 U.S.C. §§ 4401-4424, to states engaged in wagering operations.[1] 25 U.S.C. § 2719(d)(1) provides:

---

1. 26 U.S.C. § 4402(3), in affording states an exemption from wagering and related occupational taxes, provides:

> No tax shall be imposed by this subchapter —
>
> **(3) State-conducted lotteries, etc.** — On any wager placed in a sweepstakes, wagering pool, or lottery which

(Cont'd)

(d) Application of the Internal Revenue Code of 1986.

> (1) The provisions of the Internal Revenue Code of 1986 (including Sections 1441, 3402(q), 6041, and 6050 I, and Chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a tribal-State compact entered into under Section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

The Tenth Circuit rejected that and other arguments of the Nations and affirmed the District Court's judgment. In addressing the tax-exemption issue, the Tenth Circuit characterized the relevant statutory provision as "cryptic;" did not apply any test for determining the existence of an ambiguity; implicitly (if not expressly) recognized an ambiguity; neither invoked nor applied the relevant Indian-law canons of construction to 25 U.S.C. § 2719(d)(1);[2] and stated in its Opinion

(Cont'd)

> is conducted by an agency of a state acting under authority of State law, but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

The Tenth Circuit concluded that pull-tab games are a lottery. *Chickasaw v. United States*, 208 F.3d 871, 877 (10th Cir. 2000). The lottery conclusion is not challenged here. The Petitioner Nations respectfully submit the tax-exemption issue to this Court for review.

2. In the instant context, those canons require that federal "statutes are to be construed liberally in favor of the Indians, with

(Cont'd)

in the *Chickasaw* appeal[3]:

> Although it is true that § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definition of the terms "wager" and "lottery." In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of

(Cont'd)

ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). "The canons of construction applicable to Indian law are rooted in the unique trust relationship between the United States and the Indians." *Id.* Various manifestations of the Indian-law canons of construction have been recognized and applied two hundred years. *See Choate v. Trapp*, 224 U.S. 665, 675 (1912). The canons specifically apply to tax exemption questions. *Montana v. Blackfeet Tribe*, 471 U.S. at 766 n.4 ("Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in 'the Government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal. . . .' *Choate v. Trapp*, 224 U.S., at 675.").

3. In the *Choctaw* appeal, rather than issuing an Opinion, the Court of Appeals issued a four-page Order and Judgment that adopted by reference the Opinion in the companion *Chickasaw* case and affirmed the District Court judgment in favor of the Government.

> taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Chickasaw, 208 F.3d at 883-84.

Nineteen days after *Chickasaw* was handed down, the United States Court of Appeals for the Federal Circuit issued its Opinion in *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000) (App. p. 101a.). That case, an appeal from cross motions for summary judgment that were resolved in favor of the Government, presented the same 25 U.S.C. § 2719(d)(1) tribal gaming exemption issue addressed by the *Chickasaw* Opinion. In *Little Six*, the Federal Circuit began its analysis with the language of IGRA, and explained:

> We agree with Little Six that, although wagers placed on Indian pull-tab games are subject to taxation under I.R.C. §§ 4401 and 4411, Indian tribes are nevertheless exempt from such taxes under 25 U.S.C. § 2719(d)(1). Again, we begin with the language of the relevant statutes. Section 2719(d)(1) provides in relevant part that:
>
> > The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, 6050I, *and chapter 35 of such Code)* concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to*

> > *Indian gaming operations* conducted pursuant to this chapter . . . *in the same manner as such provisions apply to state gaming and wagering operations.*

25 U.S.C. § 2719(d)(1) (emphasis added). Thus, chapter 35 of the Internal Revenue Code applies to Indian gaming in the same manner as it does to state gaming. Section 4402(3), which is found in chapter 35 of the Internal Revenue Code, provides an express exemption for "any wager placed in a sweepstakes, wagering pool or lottery which is conducted by an agency of a State acting under the authority of State law." I.R.C. § 4403(3). Accordingly, section 2719(d)(1) can reasonably be construed as providing a tax exemption for wagers placed on lotteries and pull-tab games conducted by Indian tribes, because chapter 35 of the Internal Revenue Code provides such an exemption to state gaming operations.

> *Little Six*, 210 F.3d at 1365. Aware of the Tenth Circuit's *Chickasaw* Opinion three weeks earlier, the Federal Circuit in *Little Six* rejected its reasoning:
>
> > The government argues that Little Six is not exempt from wagering taxes, because section 2719(d)(1) only applies to those tax provisions that concern "the reporting and withholding of taxes [from] winnings." 25 U.S.C. § 2719(d)(1). However, in construing a statute we must give effect and meaning to all of its terms if possible. *See Bailey v. United States*, 516 U.S. 137, 145 . . . (1995). While section 2719(d)(1) does contain the language cited by the government, it also explicitly refers to section 6050I

> and chapter 35 of the Internal Revenue Code, which clearly do not relate to "winnings." *See* I.R.C. § 6050I (returns relating to cash received in trade or business); I.R.C. §§ 4401-4405 (chapter 35) (taxes on wagering). Thus, the interpretation proposed by the government would render language in the statute superfluous, a result that we must attempt to avoid.

Id.

In what could be viewed as an exposition, in light of the Indian rules of statutory construction, of the Tenth Circuit's statement that: "[a]lthough it is true that § 2719(d)'s reference to Chapter 35 is somewhat cryptic," *Chickasaw*, 208 F.3d at 883, the Federal Circuit applied an "inconsistency between portions of the same statute" test for the existence of an ambiguity and found that particular "cryptic" provision to be an ambiguity that, under this Court's controlling precedents, must be resolved in favor of the Tribe:

> In view of the inconsistency between the statute's reference to winnings and its reference to § 6050I and Chapter 35 of the Internal Revenue Code, we conclude that the language in § 2719(d)(1) is ambiguous. Little Six argues that, to the extent the statute is ambiguous, the Indian canon of construction requires section 2719(d)(1) to be construed in their favor. We agree. As stated by the Supreme Court, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to the benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 75, 766 . . . (1985).

Little Six, 210 F.3d at 1365.

The Federal Circuit ended that portion of its Opinion with a footnote directly criticizing the Opinion that Petitioners seek to have reviewed here:

> We note that the Tenth Circuit has recently held that 25 U.S.C. § 2719(d) does not provide tribes with the same exemption from federal wagering excise taxes enjoyed by the states. *See Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000). We do not agree. The Tenth Circuit did not discuss the Indian canon of construction, which we believe fully applies here.

Little Six, 210 F.3d at 1365 n.2.

The *Little Six* Court concluded its statutory examination with language that contradicts the Tenth Circuit's reasoning that "[h]ad Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption." *Chickasaw*, 208 F.3d at 884. Rather, the Federal Circuit explained:

> In the present case, having determined that the language of section 2719(d)(1) is ambiguous and can reasonably be construed as exempting Indian pull-tab games from the taxes at issue, we conclude that *Cook* is inapposite. **Moreover, the Supreme Court has held that, "although tax exemptions generally are to be construed narrowly, in 'the government's dealing with Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.' "** *Montana*, 471 U.S. at 766, n.4 (citing *Choate v. Trapp*, 224 U.S. 665, 676 (1912)). We

> therefore conclude that section 2719(d)(1) should be construed in favor of Little Six. The Court of Federal Claims erred in granting the government's motion for summary judgment and abused its discretion in denying Little Six's motion for summary judgment.

Little Six, 210 F.3d at 1366 (emphasis added).

Subsequent to the *Little Six* decision, the petitioning Nations here sought rehearing, suggested rehearing *en banc*, and called to the Tenth Circuit's attention the express Federal Circuit criticism in *Little Six* of the Tenth Circuit panel's reasoning in its *Chickasaw* Opinion. After ordering a response brief from the Government, the Tenth Circuit denied rehearing without comment. In *Little Six*, the rehearing sought by the Government remains pending. Final briefing was received by the Federal Circuit on August 10, 2000.

REASONS FOR ALLOWING THE WRIT

PROPOSITION ONE

THE WRIT SHOULD BE ALLOWED TO RESOLVE THE CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEALS ON THE IMPORTANT MATTER OF WHETHER 25 U.S.C. § 2719(d)(1)'S EXPRESS INCORPORATION OF CHAPTER 35 OF THE INTERNAL REVENUE CODE CONFERS ON INDIAN TRIBES THE SAME EXEMPTION FROM WAGERING TAXES AFFORDED TO STATES BY THAT CHAPTER.

A. THE MATTER IS IMPORTANT BECAUSE THE CONFLICT BETWEEN THE COURTS OF APPEALS PREVENTS UNIFORM APPLICATION OF OUR NATIONAL SCHEME OF TAXATION.

As a first principle, legislation addressing tax exemptions "should be interpreted 'so as to give a uniform application to a nationwide scheme of taxation.' " *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938). The conflict between the circuits resulting from *Little Six* and the *Chickasaw* opinion, for which review is sought here, violates that first principle and prevents the uniform application of our nationwide taxation scheme. This Court has previously allowed the Writ to resolve conflicts between the Court of Claims (the predecessor in certain appellate matters to the Court of Appeals for the Federal Circuit) and some of the Courts of Appeals in matters of tax administration. *United States v.*

Zacks, 375 U.S. 59, 61 (1963) ("Because of the recurring importance of the problem in administration of the tax laws and a conflict between the decision below and those of some of the Courts of Appeals, we granted certiorari."). Likewise, certiorari has been granted to resolve conflicting circuit decisions on the inclusion in the gross estate for estate tax purposes of that portion of an irrevocable trust representing accumulated income. *United States v. O'Malley*, 383 U.S. 627, 629-30 (1966). *Cf. United States v. Muniz*, 374 U.S. 150, 151 (1963) (certiorari granted to resolve an important question of construction of the Federal Tort Claims Act and because Courts of Appeals had reached conflicting results on the issue). Certiorari is needed to achieve that national uniformity.[4]

The conflict between the unanimous panels over whether 25 U.S.C. § 2719(d)'s express reference to I.R.C. Chapter 35 affords to Indian tribes the same exemption from wagering taxes given to states by that Chapter underscores the need

4. The Nations acknowledge that the Government's petition for rehearing has not yet been denied in *Little Six*, and recognize the Federal Circuit's unlimited authority to modify its opinion. However, because of the time limits controlling this Petition, the *Little Six* Opinion's status as "for publication," and the express reference in *Little Six* to the *Chickasaw* Opinion, the Nations are treating the *Little Six* Opinion as presently contributing to an intercircuit conflict. If the *Little Six* Opinion were to be withdrawn and the Federal Circuit were to then adopt a version of the Tenth Circuit's reasoning, certiorari would still be appropriate to address the important matter of whether under the applicable Indian-law canons of construction the "cryptic" inclusion of the reference to I.R.C. Chapter 35 in 25 U.S.C. § 2917(d)(1) secures for Indian Tribes the express policy benefits of IGRA and provides Indian tribes tax treatment equal to that afforded to states engaged in wagering operations.

for this Court to resolve that disputed question disrupting nationwide tax-law application. The question, though divisive, is simple. Either the Indian-law canons of construction, reiterated by this Court in *Montana v. Blackfeet Tribe* and numerous other cases, apply to resolve the ambiguity in favor of the exemption for the tribes (as determined in *Little Six*) or they do not. The competing Circuits appear to be entrenched on the matter. Prior to its decision in *Little Six*, the Federal Circuit was aware of the Tenth Circuit's failure to apply the Indian-law canons to resolve the ambiguity, as the criticism of *Chickasaw* in *Little Six* confirms. The Tenth Circuit, made aware on rehearing of both the *Little Six* application of the Indian-law canons and the Federal Circuit's criticism of the Tenth Circuit's failure to do the same, nevertheless stood firm, cementing the conflict without comment or dissent. The lines of division are clear. Certiorari is needed to clarify for the benefit of all Indian tribes that might engage in gaming, presently gaming tribes, and the Internal Revenue Service, the correct application of our nationwide scheme of federal wagering taxation.

The Nations fully expect the Government to concur in this Petition. Having lost the exemption issue in *Little Six*, the Government is hard pressed to deny that the question presented here warrants review on certiorari. If rehearing is denied in *Little Six*, the Government (should it deny the importance of the question presented here) would lack credibility if it decided to later seek the Writ in *Little Six*. Simply put, if the question presented is sufficiently significant to warrant review in *Little Six*, that same question, as framed by the disparate reasoning of the competing Circuit Courts' Opinions currently extant, warrants review here. The Nations respectfully submit that the best course of action

would be for this Court to grant the Writ in this case, grant the likely-sought Writ when *Little Six* is finalized (regardless of outcome), and determine the cases together on the merits to resolve their jointly presented issue of whether, under the applicable Indian-law canons of construction, 25 U.S.C. § 2719(d)(1)'s express incorporation of Chapter 35 of the Internal Revenue Code confers on Indian tribes conducting gaming operations the same exemption from federal wagering taxes afforded to states by that Chapter.

B. THE MATTER IS IMPORTANT BECAUSE ITS RESOLUTION WILL EITHER ADVANCE FEDERAL INDIAN POLICY, AS EXPRESSED IN IGRA, BY INCREASING TRIBAL REVENUE AVAILABLE FOR TRIBAL ECONOMIC DEVELOPMENT, TRIBAL SELF-SUFFICIENCY AND STRONG TRIBAL GOVERNMENT, OR IMPEDE THAT POLICY BY DIMINISHING THE AMOUNT OF TRIBAL REVENUE AVAILABLE FOR THOSE PURPOSES.

It is beyond dispute that the generation of tribal gaming revenue is a congressionally-intended, important part of federal Indian policy. Consistent with IGRA's intent, this Court has specifically recognized "the Congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," in the specific tribal-gaming context. *California v. Cabazon Band of Indians*, 480 U.S. 202, 216 (1987). In enacting IGRA, Congress expressly reaffirmed that policy, and included among its goals the promotion of tribal economic development, tribal self-sufficiency and

strong tribal government, 25 U.S.C. § 2701(4), and further declared that one of IGRA's purposes was "to protect such . . . [Indian] gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3).

In its attempt to meet that goal and fulfill that purpose, Congress authorized tribes, subject to certain conditions, to operate Class II gaming (including pull-tabs) on their tribal lands. A significant condition precedent to a tribe's operation of Class II gaming is approval by the Chairman of the National Indian Gaming Commission of a tribal ordinance or resolution guaranteeing that

> net revenues from any tribal gaming are not to be used for purposes other than. . . . (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

25 U.S.C. § 2710(b)(2)(B).

That revenue-generating tribal gaming, authorized by IGRA, advances the mutual interests of both the Government and Indian tribes. *Cf. Cabazon*, 480 U.S. at 218-19. In furtherance of the concept of self-government as tribal revenues increase, tribal dependence on congressional appropriations decreases. *Cabazon*, 480 U.S. 202, 217 n.20 (quoting President Reagan's 1983 Statement on Indian Policy, which provided in pertinent part that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater

percentage of the cost of their self-government." (citation omitted)). Through tribal gaming revenue, the federal goals of tribal economic development, tribal self-sufficiency and strong tribal government are advanced without either the expenditure of federal fiscal resources or the self-defeating dependence inherent in perpetual federal support. As the *Cabazon* Court noted:

> [a] policy directive issued by the Assistant Secretary of the Interior on March 2, 1983, stated that. . . . "A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced." . . . [T]he Director of Indian Services [of the] Bureau of Indian Affairs [has also stated that] "[i]t is the department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination. All of these are federal goals for the tribes. Furthermore, it is the Department's position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan's Indian Policy Statement of January 24, 1983."

Cabazon, 480 U.S. at 217-18 n.21.

Since some tribes receive little, if any, direct federal financial support, gaming is the only realistic means of financing needed tribal governmental programs. The controlling report of the Senate Select Committee on Indian Affairs (which advanced what is now IGRA to the Senate)[5] explained:

> Since the Seminole Tribe opened its game and succeeded in court, over 100 bingo games have been started on Indian lands in states where bingo is otherwise legal. As established in testimony presented to the Committee, it was determined that collectively, these games generate more than $100 million in annual revenues to tribes. Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible. For various reasons, not all tribes can engage in profitable gaming operations. However, for those tribes that have entered into the business of business, the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.

S. Rep. No. 100-446, at 2-3 (1988), *reprinted* in 1988 U.S.C.C.A.N. 3071, 3072.

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5. No House report was submitted with IGRA legislation. *See* 1988 U.S.C.C.A.N. at 3071.

Indian gaming is on the rise, as Congress intended by enacting IGRA. Tribes have taken advantage of IGRA to advance their governmental interests since the enactment of the statute. The National Indian Gaming Commission which, along with the tribal governments, administers IGRA Class II gaming (including pull-tabs), has substantially increased in size and budget since 1988. It is beyond dispute that Indian gaming, through IGRA, has become an important and growing part of federal Indian policy.

The federal taxation of those tribal gaming operations is of obvious vital interest to the tribes currently engaged in gaming, as well as to those tribes which might engage in gaming in the future and to the Government charged with implementing federal Indian policy. Every dollar of federal tax on Indian tribal gaming operations reduces revenue otherwise available to Indian tribes to meet their potentially unfunded needs and to advance the federal Indian policy of self-sufficiency expressed by Congress in IGRA. Depending on which of the conflicting Circuit Court views prevails on the availability to Indian tribes of IGRA's wagering-tax exemption, the congressional policy of tribal self-sufficiency embodied in IGRA will either be promoted or impeded. Depending on that outcome, tribes will either have more or less self-generated revenues for their tribal governmental and economic development purposes, and tribal dependency on federal appropriations to meet governmental needs will either decline or increase. The question here is undeniably important to both Indian tribes and the Government.

C. THE MATTER IS IMPORTANT IN LIGHT OF CONGRESSIONAL INTENT THAT TRIBES ENGAGED IN WAGERING OPERATIONS RECEIVE THE SAME FEDERAL TAX TREATMENT AS AFFORDED TO STATES ENGAGED IN WAGERING OPERATIONS.

States are competitors with Indian tribes for revenue generated by wagering operations. Like tribes, states engage in those operations to provide for the general welfare of their citizens. Chapter 35 of the Internal Revenue Code exempts state wagering operations from that Chapter's federal wagering and related occupational taxes. The issue arises as to whether the competing state and tribal gaming operations (both conducted for governmental purposes) should receive equality of federal excise tax treatment under Chapter 35.[6] For obvious reasons, the question whether tribes and states should be afforded the same or disparate federal wagering tax treatment is important to both Indian tribes and their state government competitors.

One clear indication of congressional intent as to the purpose behind the express inclusion of I.R.C. Chapter 35 in 25 U.S.C. § 2719(d)(1) underscores the importance of parity of tax treatment as being at the heart of the intercircuit conflict here. The Chairman of the Senate Select Committee on Indian Affairs (which, as noted above, advanced IGRA) explained that federal taxation of wagering operations would violate the legislative intent expressed through the inclusion

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6. According to long-established IRS pronouncements, Indian tribes are not subject to federal income taxes. Rev. Ruling 67-284, 1967-2 C.B. 58; Rev. Ruling 81-295, 1981-2 C.B. 16; Rev. Ruling 94-16, 1994-1 C.B. 20.

of I.R.C. Chapter 35's exemption in 25 U.S.C. § 2719(d) and make the tribes worse off than those states against whom the tribes compete. In a letter to the Commissioner of the Internal Revenue Service by IGRA's primary author, Senator Inouye explained:

> As primary author of the Indian Gaming Regulatory Act, I write to advise you it was the intention of Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code. Because the purpose of wagers for both tribal and state governments is to provide for the general welfare of their citizens, it was the view of Congress that to impose a higher rate upon tribal government-conducted gaming activities would be unfair. Accordingly, it was this result that the Congress intended to avoid by including the reference to Chapter 35, in stating that "[t]he provisions of the Internal Revenue Code of 1996 (including . . . Chapter 35) shall apply to Indian gaming operations conducted pursuant to this Act . . . in the same manner as such provisions apply to State gaming and wagering operations."

Letter from Sen. Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs, to Hon. Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service 1 (Dec. 12, 1991) (reproduced at p. CN-100, Appellant's Appendix on Appeal to the Tenth Circuit, *Chickasaw*, 208 F.3d 871) (App. p. 112a.).

A more clear and authoritative statement of the congressional purpose for including the "cryptic" reference to I.R.C. Chapter 35 in 25 U.S.C. § 2719(d)(1) does not exist[7]. The Senate Committee Report on IGRA (the *only* extant report, *see supra* at 17 n.5) is silent on the subject.

The patent policy desirability of tax parity between Indian tribes and states that conduct gaming operations to benefit governmental purposes, the express inclusion of I.R.C. Chapter 35 in 25 U.S.C. § 2719(d)(1), and the Senate Committee Chairman's direct explanation of the reason for the Chapter's inclusion all make the matter of the Congressional intent expressed by the incorporation of Chapter 35 an important question worthy of resolution by this Court. Petitioners respectfully submit that these factors furnish an independent reason for this Court to grant the Writ.

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7. The fact that Senator Inouye's statement occurred after the legislation had been adopted by Congress does not diminish its persuasive nature. The Court in *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) expressly relied on a post-passage statement of the legislative sponsor to bolster the Court's conclusion as to the effect of an Act. ["Our conclusion is buttressed by the remark of the legislator chiefly responsible for guiding the Termination Act to enactment, Senator Watkins, who stated upon the occasion of the signing of the bill that it . . ."].

PROPOSITION TWO

THE WRIT SHOULD BE ALLOWED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED THE IMPORTANT FEDERAL QUESTION OF THE AVAILABILITY TO INDIAN TRIBES PURSUANT TO 25 U.S.C. § 2719(d)(1) OF I.R.C. CHAPTER 35'S EXEMPTION FROM FEDERAL WAGERING TAXES IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT PRESCRIBING THE INDIAN-LAW CANONS OF CONSTRUCTION AS THE APPROPRIATE METHODOLOGY FOR RESOLVING STATUTORY AMBIGUITIES.

This Court has long recognized that "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United states and the Indians," *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), and that such canons require that federal statutes be construed in the manner most favorable to Indian tribes where more than one construction of a federal statute is reasonable. *E.g.*, Felix S. Cohen's Handbook of Federal Indian Law 222-25 (Rennard Strickland ed. 1982) (analyzing and collecting cases). The principle applies whether or not Indian treaty rights are involved. *See e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 765-67 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139-52 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-60 (1978); *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 353-54 (1941). *See generally McClanahan v. Arizona State Tax Comm'n*,

411 U.S. 164, 172 (1973) ("Indian sovereignty . . . provides a backdrop against which the applicable . . . federal statutes must be read."). The Court has applied the canons to tax-exemptions. *See, e.g., Choate v. Trapp*, 224 U.S. 665, 675 (1912). *See also Blackfeet Tribe*, 471 U.S. at 766 n.4 (1985) ("[A]lthough tax exemptions generally are to be construed narrowly, in 'the Government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal. . . .' " (Citation omitted)).

When it enacted IGRA, Congress was not only constructively, but actually aware of this Court's long-standing Indian-law canons of construction. The Senate Select Committee on Indian Affairs (which advanced through Congress what became IGRA) expressly stated its desire that those canons be applied to resolve in favor of Indian tribes statutory ambiguities:

> The Committee recognizes that this may include issues of a very general nature and, of course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

S. Rep. No. 100-446 at 15 (1988), *reprinted* in 1988 U.S.C.C.A.N. 3071, 3085.

The clarity of this Court's teachings and that legislative history notwithstanding, the Tenth Circuit's *Chickasaw* Opinion demonstrates the need for a new reaffirmation by this Court of the Indian-law canons' controlling nature.

Although this case undisputably involves patent ambiguity[8] in a statute applicable to Indian tribes and only Indian tribes, the Tenth Circuit (both in the panel opinion and on rehearing) chose to forego these canons' application and avoided even mentioning them in resolving the IGRA tax-exemption question.

Chickasaw's result is the resolution of the ambiguity against the Indians, in direct contradiction of this Court's decisions on the Indian-law canons. Certiorari is needed to secure application of this Court's Indian-law canons here and to inform the lower courts, including those in the Tenth Circuit, that the Indian-law canons remain controlling.

8. Even the *Chickasaw* Court's language demonstrates that the Tenth Circuit panel found 25 U.S.C. § 2719(d)(1) (which it labeled "cryptic") to be ambiguous. Apart from the inherent difficulty of distinguishing between "cryptic" statutes and ambiguous ones, the use of the superlative "the most reasonable" confirms the existence of statutory ambiguity. The Tenth Circuit could have easily and precisely stated that its conclusion or construction was "the only reasonable" one, thereby suggesting the existence of ambiguity.

CONCLUSION

The Chickasaw Nation and The Choctaw Nation of Oklahoma respectfully request the Court to grant their Petition for Writ of Certiorari and to review the decisions of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN *THE CHICKASAW NATION v. UNITED STATES* DATED AND FILED APRIL 5, 2000

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-7042

THE CHICKASAW NATION,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 97-CV-511-P)

* * *

Before **BRISCOE**, **ANDERSON**, and **LUCERO**, Circuit Judges.

BRISCOE, Circuit Judge.

The Chickasaw Nation (Nation) appeals from the district court's entry of judgment in favor of defendant United States on the Nation's claim for a refund of federal wagering and

occupational excise taxes. The Nation alleges that these taxes were unlawfully assessed against its pull-tab gaming activities pursuant to 26 U.S.C. §§ 4401 and 4411. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

The Nation is a Native American Indian Tribe with its principal place of business in Ada, Oklahoma. Doing business under the names Chickasaw National Central Business Services and Chickasaw Enterprises, the Nation operates a number of for-profit business activities within the State of Oklahoma, including gaming centers, tobacco shops, convenience stores, gas stations, a motel, a restaurant, an accounting firm, a radio station, an internet service provider, and a computer store. All of the businesses are open to and utilized by members of the Nation and the general public.

As part of its business activities, the Nation sells "pull-tabs" at a variety of locations, including its gaming centers and convenience stores. A pull-tab is a two inch by four inch card or ticket containing five windows covered with tabs. Various symbols are found under the tabs. The face of the pull-tab discloses the combination of symbols that results in a winning ticket. To play a pull-tab, a player simply pulls back each tab and checks the symbols found under the tabs to ascertain whether he holds a winning ticket. Depending upon the point of sale, players can purchase pull-tabs from a clerk or directly from a dispensing machine. Each pull-tab typically costs between 25 cents and one dollar, and typically allows a player to win between 25 cents and $2500. If a player purchases a winning pull-tab, he can

redeem the a\ 'ard by presenting the pull-tab to a cashier at one of the points of sale. Although players frequently present winning tickets for payment on the date of purchase, it is not uncommon for them to claim their awards later.

The Nation purchases pull-tabs in series of 24,000 tickets. Each ticket in a series contains the same serial number. The ticket manufacturer prints each ticket in a series with a winning or losing combination of symbols. A fixed number of tickets in each series have a winning combination of symbols, and those tickets are distributed randomly throughout the series. It always takes the Nation more than one business day to sell an entire series of pull-tabs. Each ticket also indicates how many winners there will be in each series (e.g., four $500 winners, four $75 winners, etc.). Once all of the tickets in a series are sold to players, the series is officially closed and winning tickets are no longer honored.

The dispute between the Nation and the United States involves whether the Nation must pay wagering excise taxes and federal occupational taxes. During the time period relevant to this lawsuit, the Nation generally withheld income taxes from pull-tab players' winnings in accordance with 26 U.S.C. § 3402(q). The Nation also filed with the Internal Revenue Service (IRS) information returns concerning player winnings. The Nation did not, however, pay federal wagering excise taxes or federal occupational taxes in connection with its pull-tab sales. After conducting an audit, the IRS determined that the Nation was subject to federal wagering excise taxes under 26 U.S.C. § 4401(a)(1) for the period from August 1991 through August 1994, and federal occupational taxes under 26 U.S.C. § 4411 for the period from January

1993 through September 1994. On July 1, 1996, the Nation paid a total of $1,368.93 for federal wagering excise and occupational taxes determined by the IRS to be owing for July 1993. The Nation simultaneously filed with the IRS a claim for a refund of this amount.

The Nation subsequently waived its right to a statutory notice of disallowance of its refund claim and, on September 5, 1997, filed this action for refund. The United States counterclaimed for (1) the unpaid portion ($41,570.12) of the wagering excise taxes and interest assessed against the Nation for the period from August 1991 through August 1994, and (2) the unpaid portion ($1,782.48) of the occupational taxes and interest assessed against the Nation for the period from January 1993 through September 1994. The parties eventually filed cross-motions for summary judgment, and agreed that if the district court resolved the case on summary judgment, neither would "raise on appeal that a controverted material fact exist[ed] which preclude[d] summary judgment." App. at 260 (pretrial order). On December 30, 1998, the district court entered judgment in favor of the United States.

II.

We review de novo the district court's grant of summary judgment, applying the same standard as the district court under Federal Rules of Civil Procedure 56(c). *See Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, 120 S. Ct. 53 (1999). Summary judgment is appropriate where no genuine issues of material fact exist and the moving

party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When reviewing a grant of summary judgment, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Simms*, 165 F.3d at 1326. Questions of law relevant to the summary judgment are reviewed de novo. *C-470 Joint Venture v. Trizec Colorado, Inc.*, 176 F.3d 1289, 1291 (10th Cir. 1999).

III.

The Nation attacks four aspects of the district court's decision. Specifically, the Nation contends that (1) pull-tabs do not involve a taxable wager, as defined in 26 U.S.C. § 4421, (2) it is not a "person" subject to federal wagering excise taxes, (3) the Indian Gaming Regulatory Act (IGRA) demonstrates Congress' intent not to subject Indian gaming activities to federal wagering excise taxes, and (4) the self-government guarantee of the 1855 treaty between the United States and the Nation precludes imposition of the taxes in question. We consider these arguments in order.

Do pull-tabs constitute a taxable wager under 26 U.S.C. § 4421?

The initial question is whether the purchase of one of the Nation's pull-tab cards constitutes a "wager" for purposes of the IRC. Section 4401 of the IRC provides in pertinent part:

> (a) Wagers.
>
> (1) State authorized wagers. — There shall be imposed on any wager

authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.

* * *

(b) Amount of wager. — In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax. — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

26 U.S.C. § 4401. The term "wager" is defined under the IRC as including "any wager placed in a lottery conducted for profit."[1] 26 U.S.C. § 4421(1)(C). In turn, the term "lottery" is defined under the IRC to include "the numbers game, policy, and similar types of wagering," but does not include "(A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game . . . ." 26 U.S.C. § 4421(2).

In asserting that the purchase of a pull-tab card does not constitute a "wager," the crux of the Nation's argument is that its pull-tab games fall outside the IRC's definition of "lottery." The Nation contends that "the game involves one bet by one player only," "[e]ach bet is a new game with a new pull-tab card," "[t]he player is the only person playing the game when it is determined whether he wins or loses," and "[t]he prize, if he wins one, is distributed in his presence immediately." Pl.'s Opening Br., at 28. Thus, the Nation argues, the pull-tab games fall within the statutory exclusion from the definition of "lottery" set forth in 26 U.S.C. § 4421(2)(A).

As the Nation's arguments make obvious, the critical question is whether the Nation's pull-tab games can

1. The term is also defined to include "(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, [and] (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit . . . ." 26 U.S.C. §§ 4421(1)(A) and (B). It is uncontroverted, however, that neither of these two categories are applicable here.

legitimately be characterized as a "lottery" under § 4421(2)(A) of the IRC. The starting point for answering this question is the plain language of § 4421(2)(A). *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir. 1997). The words of the statute must be construed in their "ordinary, everyday' sense." *Julius M. Israel Lodge of B'nai B'rith v. Commissioner*, 98 F.3d 190, 191 (5th Cir. 1996) (quoting *Crane v. Commissioner*, 331 U.S. 1, 6 (1947)). If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances. *Ramah*, 112 F.3d at 1460.

As previously noted, § 4421(2)(A) provides a list of examples ("numbers game," "policy," and "similar types of wagering") that fall within the definition of "lottery." It is essentially undisputed that this list of examples is nonexhaustive. As the government correctly points out, the use of the word "includes" in the statutory definition signals Congress' intent to include within the definition various types of gaming not specifically mentioned in the statute. *See West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906, 1910 (1999) (holding that Congress' use of the word "including" in the statutory phrase "through appropriate remedies, including reinstatement or hiring," made "clear that the authorization [of remedies] [wa]s not limited to the specified remedies there mentioned"). The question remains, then, what other types of games fall within the definition of the word "lottery."

To answer this question, it is helpful to refer to dictionary definitions of the word "lottery." *See United States v. Roberts*, 88 F.3d 872, 877 (10th Cir. 1996) (noting that if Congress does not define statutory term, "its common and

ordinary usage may be obtained by reference to a dictionary"). Webster's defines the word "lottery" as "a scheme for the distribution of prizes by lot or chance," and "a scheme by which prizes are distributed to the winners among those persons who have paid for a chance to win them usu[ally] as determined by the numbers on tickets as drawn at random (as from a lottery wheel)." Webster's Third New Int'l Dictionary 1338 (1993). Similarly, Black's defines the word "lottery" as "[a] chance for a prize for a price," and indicates the "[e]ssential elements of a lottery are consideration, prize and chance and any scheme or device by which a person for a consideration is permitted to receive a prize or nothing as may be determined predominantly by chance." Black's Law Dictionary 947 (6th ed. 1990). These definitions, which appear to represent the common and ordinary usage of the word "lottery," clearly encompass the specific types of games listed in § 4421(2)(A). For example, a "policy" is defined by Webster's as "a daily lottery in which participants bet that certain numbers will be drawn from a lottery wheel." Webster's, *supra*, at 1754. Likewise, "numbers" (another of the examples listed in § 4421(2)(A)) is defined as "a form of lottery played in the U.S. in which one may select any three digits from 001 to 999 and bet on them to appear in a specified order or in any combination and in which the winning numbers and order are determined by figures regularly published in newspapers . . . ." Webster's, *supra*, at 1550.

Applying these definitions, it is apparent that the Nation's pull-tab system does, in fact, constitute a "lottery." In particular, the pull-tab system utilized by the Nation is a scheme by which prizes are randomly distributed to the

winners among those persons who have paid for a chance to win them, i.e., by purchasing one or more pull-tab tickets in a series. Players purchasing tickets know there will be a specific number of prizes awarded in each series of tickets. Because the winning tickets in a series are randomly distributed throughout the series, neither the Nation nor the players know ahead of time which ticket purchasers will win the prizes.

The Nation contends its pull-tab system falls within the statutory exclusion for "(A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game . . . ." 26 U.S.C. § 4421(2). According to the Nation, each individual pull-tab ticket should be viewed as a separate "game," and, when viewed in this manner, "the game involves one bet by one player only," "[e]ach bet is a new game with a new pull-tab card," "[t]he player is the only person playing the game when it is determined whether he wins or loses," and "[t]he prize, if he wins one, is distributed in his presence immediately." Pl.'s Opening Br., at 28.

The district court rejected the Nation's arguments, finding that "[w]hen a customer purchases a pull tab, he is competing against every other person who purchases a pull tab from the same series for the limited number of winners contained in each series of pull tabs." App. at 269. Further, the district court concluded:

> The purchase of a pull tab constitutes only the play of a "gaming piece" in a game that consists of a "deal" or "series" of such pieces. The pull tab operators here have a continuing wager of prizes in a particular "deal," and this wager is accepted by all those who might purchase pull-tabs from that "deal" until all tickets are sold. The winners are determined at the time the series is manufactured, and thus, the winners are predetermined outside the presence of any persons placing wagers in such game.
>
> Therefore, pull tab gaming consists of a player selecting a card already vested with independent significance. As the Commissioner observed in Rev. Rul. 57-241, 1957-1 C.B. 419, 420, "[t]he inherent feature" of games that are excluded from the definition of lottery in Section 4421(2)(A) "is that of 'group play' . . ." By, (sic) contrast, Plaintiff's pull tab gaming activities represents discrete, individual, advance-purchase gambles that do not qualify for exclusion from the wagering tax.

App. at 273-74 (citations omitted).

We agree with the district court's conclusion. Contrary to the Nation's arguments, whether pull-tab gaming constitutes a "lottery" for purposes of the IRC cannot be determined by viewing each individual purchase of a pull-tab ticket as a game unto itself. As previously noted, the tickets are purchased and resold by the Nation in series of 24,000

tickets, with a specific number of winning tickets randomly distributed throughout the series. Thus, when a player purchases a ticket, he is competing against all other persons who purchase tickets from that same series. It is uncontroverted that the prizes for a particular series of tickets are not awarded all at one time or in the same location. Rather, the prizes are (or at least can be) awarded at a number of the Nation's businesses over an extended period of time. Accordingly, the pull-tab gaming system does not fall within the statutory exclusion.

Because we conclude the Nation's pull-tab system constitutes a lottery, we likewise conclude the purchase of a pull-tab ticket constitutes a "wager" for purposes of IRC § 4401.

Is the Nation a "person" for purposes of the federal taxes at issue?

The Nation next asserts that it is not a "person" subject to the federal wagering excise tax set forth in § 4401, or the federal occupational excise tax set forth in 26 U.S.C. § 4411. Because resolution of this issue turns on statutory construction, our overriding purpose is to determine congressional intent. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). "In ascertaining the plain meaning of [a] statute, [we] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Where the will of Congress "has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' " *Griffin*, 458 U.S. at

570 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Section 4401 provides that "[e]ach *person* who is engaged in the business of accepting wagers shall be liable for and shall pay" the federal wagering excise tax. 26 U.S.C. § 4401(c) (emphasis added). Likewise, § 4411 provides that "[t]here shall be imposed a special tax of $[50] per year to be paid by each *person* who is liable for the tax imposed under section 4401 . . . ." 26 U.S.C. § 4411(a) (emphasis added). Because neither § 4401 nor § 4411 defines the word "person," it is agreed we must rely on the IRC's general "Definitions" provision, 26 U.S.C. § 7701. According to § 7701(a)(1), "[t]he term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1).

Although § 7701(a)(1) does not specifically list "Indian tribes" or "Indian tribal governments," its definitional phrase is prefaced with the word "include." According to § 7701(c), "[t]he terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U.S.C. § 7701(c); *see generally In re Joplin*, 882 F.2d 1507, 1511 (10th Cir. 1989) (rejecting, under IRC § 7701(c), an interpretation of the revenue laws that would substitute the term "limited to" for "including"). Thus, the list of entities contained in § 7701(a)(1) cannot be construed as exhaustive, and its failure to specifically list Indian tribes or tribal organizations is not determinative of whether such entities are "persons" for purposes of this case.

See Commonwealth Nat'l Bank of Dallas v. United States, 665 F.2d 743, 750 (5th Cir. 1982) (concluding that because the definition of the term "person" in IRC § 6671(b) contained the word "includes," it encompassed entities not specifically listed therein); *Pacific Nat'l Ins. Co. v. United States*, 422 F.2d 26, 30 (9th Cir. 1970) ("By use of the word 'include[s] the definition [of "person" in IRC § 6671(b)] suggests a calculated indefiniteness with respect to the outer limits of the term . . . ."); *see also State of Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (construing broadly a statutory definition using the phrase "means and includes").

To determine whether Congress intended Indian tribes and tribal organizations to fall within the scope of § 7701(a)(1), we turn to the ordinary, common meaning of the word "person." *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (noting that "words will be interpreted as taking their ordinary, contemporary, common meaning" at the time Congress enacted the statute); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) (noting that where Congress does not explain the specific meaning of a statutory phrase or term, a court may assume Congress intended the words to be given their ordinary meaning and determine such meaning through the use of dictionaries). Although "person" is sometimes interpreted to mean only "a human being," the dictionary definition alternatively indicates that it includes "a human being, a body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties." Webster's, *supra*, at 1686. Obviously, the narrow definition of "person" to mean only "a human being" is not consistent with the framework of § 7701(a)(1). In light of the list of

entities included within § 7701(a)(1), we conclude that Congress must have intended to incorporate the broad definition of the word "person." Thus, we conclude that Congress unambiguously intended for the word "person," as used in § 7701(a)(1), to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties. *See generally Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195 (5th Cir. 1997) (noting a statute is ambiguous if it is susceptible of two different meanings).

Our conclusion on this point is consistent with other decisions that have construed the word "person," as used in the IRC, to encompass legal entities not specifically listed in the statutory definition. *See Helvering*, 292 U.S. at 371 (holding that when a state "becomes a dealer in intoxicating liquors," it "falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension."); *Estate of Wycoff v. Commissioner*, 506 F.2d 1144, 1151 (10th Cir. 1974) (concluding that the definition of the word "person," as found in IRC §§ 2056(b)(5) and 7701(a)(1), includes individual states and the United States). To include Indian tribes and tribal organizations in § 7701(a)(1)'s definition of "person" is also consistent with a recent decision by the Eighth Circuit Court of Appeals. The Eighth Circuit held that the word "person," as used in §§ 6421 and 6675 of the IRC, encompasses Native American tribes. *See Flandreau Santee Sioux Tribe v. United States*, 197 F.3d 949, 951 (8th Cir. 1999). The *Flandreau* court recognized that " '[i]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.' " *Id.*

(quoting *Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993)). The court similarly noted that the Internal Revenue Code "must be given as great an internal symmetry and consistency as its words permit." *Id.* (quoting *Keystone*, 508 U.S. at 159).

We also emphasize that were we to conclude that Indian tribes and tribal organizations are excluded from § 7701(a)(1)'s definition of "person," we would essentially exempt tribes and tribal organizations from many forms of federal tax liability and render entire sections of the IRC superfluous. For example, § 7871 of the IRC extends to Indian tribes an exemption from the federal excise tax on diesel and special motor fuels that, like the federal wagering excise tax at issue here, is imposed on "persons" falling within the scope of § 7701(a)(1). *See* 26 U.S.C. §§ 4041(a) (imposition of fuel excise tax) and 7871(a)(2)(A) (exemption for tribes). If Indian tribes were held not to be "persons" within the meaning of § 7701(a)(1), then the exemption granted to Indian tribes by § 7871 would be unnecessary.

The Nation contends that Congress could not have intended to include Indian tribal governments within the scope of the word "person." The Nation points out that Congress specifically defined the phrase "Indian tribal government" in a separate subsection of § 7701,[2] but did not

2. The phrase "Indian tribal government" is separately defined in § 7701 as "the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions." 26 U.S.C. § 7701(a)(40).

include that phrase in § 7701(a)(1)'s definition of the word "person." It is true that " 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). This canon of statutory construction, however, is not applicable here. As we have already concluded, Congress clearly did not intend for the list of entities in § 7701(a)(1) to be exhaustive. Thus, the omission of the phrase "Indian tribal government" is not determinative, even though that phrase is separately defined elsewhere in § 7740. In our view, it is telling that the terms "State" and "United States," both of which are separately defined in § 7701[3], are not among the entities specifically listed in § 7701(a)(1), yet both have been held to be "persons" within the meaning of § 7701(a)(1). *See Estate of Wycoff*, 506 F.2d at 1151 ("State" and "United States," although separately defined, are "persons" within meaning of § 7701(a)(1)). If Congress wishes to exempt Indian tribes from excise taxes that otherwise might be reasonably construed as applying to them, it should do so explicitly.

The Nation cites two additional canons of statutory construction in support of its position. First, the Nation argues that federal statutes are to be construed liberally in favor of Native Americans. Second, the Nation notes that federal tax statutes are to be construed in favor of taxpayers.

3. The term "State" is defined in 26 U.S.C. § 7701(a)(10). The term "United States" is defined in 26 U.S.C. § 7701(a)(9).

The problem, however, is that these canons of statutory construction apply only where the statute at issue is ambiguous. *See Ramah*, 112 F.3d at 1461 (discussing the rule of statutory construction favoring Native Americans); *Royal Caribbean Cruises, Ltd. v. United States*, 108 F.3d 290, 294 (11th Cir. 1997) (discussing the rule of statutory construction favoring taxpayers). Because we conclude § 7701(a)(1) unambiguously encompasses all legal entities that are the subject of rights and duties and that Indian tribes are such legal entities, the rules of statutory construction cited by the Nation are inapplicable.

Finally, the Nation offers two additional arguments in support of its assertion that it is not a "person" for purposes of § 7701(a)(1). Citing various Revenue Rulings, the Nation notes that the IRS has consistently held that Indian tribal governments are not subject to federal income tax. As the government correctly points out, however, these Revenue Rulings say nothing about the applicability of federal excise taxes to Indian tribes, and thus do not require the result sought by the Nation. Second, the Nation argues that it is a sovereign political entity immune from federal taxation. Again, however, there is no merit to this argument. It is well settled that "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Although Congress has often refrained from imposing taxes on Indian tribes, the Supreme Court has never held unconstitutional a federal tax applied to Indians. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 845 F.2d 139, 143 (7th Cir. 1988).

Does the IGRA indicate Congressional intent not to impose federal wagering excise taxes or federal occupational taxes on Indian gaming activities?

The Nation contends that the imposition of federal wagering excise taxes and the accompanying federal occupational taxes on its pull-tab games is contrary to both the spirit and letter of the IGRA, 25 U.S.C. §§ 2701-2721. According to the Nation, when Congress enacted the IGRA, it clearly intended to maximize tribal gaming revenues and "chose to limit application of the [IRC] in such a manner as to tax neither tribes nor their gaming operations." Pl.'s Opening Br., at 20.

The IGRA "divides gaming on Indian lands into three classes — I, II, and III — and provides a different regulatory scheme for each class."[4] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996). According to its declaration of purpose section, the IGRA was passed by Congress:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the tribe is

4. The parties appear to agree that pull-tabs fall within Class II and are thus subject to oversight regulation by the National Indian Gaming Commission.

the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702 (1988); *see Seminole Tribe*, 517 U.S. at 48 ("Congress passed the [IGRA] in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes."). The clear and unambiguous language of this provision contradicts the Nation's assertion that Congress' sole intent in enacting the IGRA was to "maximize tribal gaming revenues." Indeed, although the above-quoted provision indicates that Congress was interested in promoting tribal economic development and self-sufficiency, there is no mention of the phrase "maximizing tribal gaming revenues." Thus, the statute's statement of purpose does not, in and of itself, demonstrate any type of Congressional intent to place tribal gaming revenues beyond the reach of federal wagering excise or federal occupational taxes.

The remaining question is whether the IGRA expressly prohibits the imposition of federal wagering excise taxes on Indian tribal organizations engaged in gaming activities. In asserting that the IGRA does prohibit the imposition of such

taxes, the Nation points to a single subsection, 25 U.S.C. § 2719(d). That subsection, entitled "Application of Internal Revenue Code of 1986," provides:

(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

25 U.S.C. § 2719(d).

According to the Nation, § 2719(d) demonstrates Congress' intent to apply only a limited number of IRC provisions — those pertaining to the reporting and withholding of taxes with respect to players' winnings — to Indian gaming operations. In support of this argument, the Nation contends that "[b]y identifying as applicable only a specific type of code provision and omitting all others, Congress confirmed its intent that the IRC provisions

creating tax liability not apply." Pl.'s Opening Br., at 21. Further, the Nation asserts that "if tribal activities under IGRA were already subject to the IRC, then § 2719(d)'s application of only certain IRC sections to such activities is mere surplusage . . . ." *Id.*

We reject the Nation's arguments. First of all, it is clear that § 2719(d) does not expressly prohibit the imposition of federal wagering excise or federal occupational taxes on Indian gaming activities. Instead, the statute provides only that IRC provisions "concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations." In other words, the statute provides that Indian gaming operations, like state gaming operations, must report certain player winnings to the federal government, and must likewise withhold federal taxes if players' winnings exceed a certain level. *See, e.g.*, 26 U.S.C. § 3402(q) (outlining withholding requirements on certain gambling winnings).

Although the Nation would have us infer from this language that Congress intended not to impose federal wagering excise and federal occupational taxes on Indian gaming activities, a review of the historical backdrop to the IGRA suggests that such an inference is unreasonable. Over the past thirty years, "Indian governments have occupied an anomalous niche within the structure of federal tax laws, enjoying some of the privileges afforded states, while at the same time being subjected to many of the burdens borne by ordinary individual taxpayers." Robert A. Williams, Jr.,

Small Steps On the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982, 22 Harv. J. on Legis. 335, 358-59 (1985). Prior to 1982, the IRS took contradictory positions regarding the tax status of Indian tribes, concluding tribal income was exempt from federal taxation, while at the same time concluding that tribes were not entitled to other tax advantages granted to states and their political subdivisions. *See id.* at 359-61. In an attempt to alleviate this situation to some degree, Congress enacted the Indian Tribal Governmental Tax Status Act of 1982 (Tax Status Act), 26 U.S.C. § 7871, and granted tribes some of the tax advantages enjoyed by states and their political subdivisions. *See id.* at 369-70. In particular, the Tax Status Act extended to tribes many, but not all, of the federal excise tax exemptions typically enjoyed by the states (such as exemptions for federal excise taxes on special fuels). *See id.* at 374-75. Among the federal excise tax exemptions enjoyed by the states but not granted to tribes in the Tax Status Act was the exemption found in the IRC for "State-conducted lotteries." *See* 26 U.S.C. § 4402(3) (granting an exemption from federal wagering excise and occupational taxes for state-conducted lotteries).

Thus, when the IGRA was being discussed in Congress in the mid-to-late 1980's, Indian tribes remained subject to certain federal excise taxes, including federal wagering excise taxes (and the accompanying federal occupation taxes). Although "[t]he original language of S.555, the bill that became IGRA, included an explicit exemption for Indian gaming from [the] federal [wagering] excise tax, . . . that exemption was deleted prior to passage." *Little Six, Inc. v. United States*, 43 Fed. Cl. 80, 83 (Fed. Cl. 1999). The only

surviving reference to taxation in the IGRA was § 2719(d), which simply provided that Indian gaming operations were required to report and withhold certain player winnings in the same manner as state gaming operations. In light of this history, we believe it is unreasonable to assume that Congress intended, by way of negative inference from § 2719(d), to exempt Indian tribes from the federal wagering excise taxes.

We also reject the Nation's suggestion that Indian tribes were not subject to the IRC's reporting and withholding requirements for gaming winnings prior to enactment of the IGRA. To the contrary, a review of the applicable reporting and withholding provisions indicates that Indian tribes, like other persons involved in gaming operations, were responsible for reporting and withholding federal taxes for winnings exceeding a certain level. *See, e.g.*, 26 U.S.C. § 3402(q) (1988). For purposes of our analysis it is important to note that the reporting and withholding requirements applicable to Indian tribes and other persons were somewhat more demanding than those applicable to state gaming operations. For example, immediately prior to enactment of the IGRA, states were responsible for reporting and withholding taxes from lottery winnings that exceeded $5,000, whereas other persons were responsible for reporting and withholding taxes from lottery winnings that exceeded $1,000. 26 U.S.C. § 3402(q)(3)(B) and (C) (1988). The IGRA, by way of § 2719(d), effectively relaxed a tribe's reporting and withholding requirements to make them equivalent to those applicable to state gaming operations.

In a final effort to persuade us that its interpretation of § 2719(d) is correct, the Nation points to a December 12,

1991 letter sent by Senator Daniel Inouye, one of the authors of the IGRA, to the Commissioner of the IRS. In his letter, Senator Inouye suggests that by specifically referring to Chapter 35 in § 2719(d), "it was the intention of Congress that the tax treatment of wagers conducted by Tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code." App. at 100. There are at least two reasons why Senator Inouye's letter is not controlling. First, the comments of a single senator, made years after the statute at issue was enacted, are of little value in interpreting the statute. *See Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 644 n.17 (1981) ("Courts, of course, should be wary of relying on the remarks of a single legislator . . . ."); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 563 n.18 (1979) ("The comments . . . of a single Congressman, delivered long after the original passage of the [act at issue], are of no aid in determining congressional intent . . . ."). Second, it is apparent, for the reasons outlined above, that Senator Inouye's interpretation of § 2719(d) is inconsistent with both the language and the legislative history of the statute. Although it is true that § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definitions of the terms "wager" and "lottery." In any event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an

assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Does the 1855 treaty preclude imposition of federal wagering excise taxes on the Nation?

The final issue is whether the 1855 treaty entered into by the Nation and the United States provides the Nation with an exemption from the federal wagering excise and occupational taxes at issue. To decide this question, we must first determine what standard of review to apply in analyzing the text of the treaty. The Ninth Circuit has indicated that a treaty must contain a "definitely expressed exemption." *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878, 882 (9th Cir. 1982). In contrast, the Third and Eighth Circuits, recognizing that treaties between the United States and Indian tribes were typically entered into long before passage of a federal income tax (or other types of federal taxes), have held that the proper test is whether a treaty " 'contains language which can reasonably be construed to confer [tax] exemptions.' " *Lazore v. Commissioner*, 11 F.3d 1180, 1185 (3d Cir. 1993) (quoting *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966)). If a treaty contains such language, these circuits hold, it will be liberally construed in favor of the Indians. *See id.* Because we conclude this latter approach is the more reasonable one, we adopt and apply it in reviewing the 1855 treaty between the Nation and the United States.

The Nation points to Article VII of the 1855 Treaty, which provides:

> So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons, with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw Tribe, and all persons, not being citizens or members of either Tribe, found within their limits, shall be considered intruders and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz.: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully traveling or temporarily sojourning in the country of trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said Tribes.

In our view, this language cannot be reasonably construed to give rise to an exemption from any federal excise

taxes. The Nation's sole argument in this regard is that the taxes at issue interfere with the right to self-government granted in Article VII of the treaty. This is a questionable proposition. Although the federal wagering excise tax at issue undoubtedly reduces the profit earned by the Nation on its gaming activities, the tax does not otherwise appear to interfere with the Nation's pull-tab wagering operations. Even assuming, *arguendo*, that the tax does interfere with the Nation's right to self-government, there appears to be no authority that would allow a treaty provision granting a tribe the right to self-government to trump the federal government's authority to impose excise taxes upon a tribe. Indeed, the Supreme Court has consistently characterized Indian tribes as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), subject to the "paramount authority" of the federal government. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 451 (1989). Thus, we conclude a treaty provision must be more explicit than the one at issue to exempt an Indian tribe from federal excise taxes.

IV.

The judgment of the district court is AFFIRMED.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN *CHOCTAW NATION OF OKLAHOMA v. UNITED STATES* DATED AND FILED APRIL 5, 2000

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-7072
(D.C. No. 97-CV-510-B)
(E.D.Okla.)

CHOCTAW NATION OF OKLAHOMA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER AND JUDGMENT*

Before **BRISCOE, ANDERSON,** and **LUCERO**, Circuit Judges.

In this companion appeal to *Chickasaw Nation v. United States*, Case No. 99-7042, plaintiff Choctaw Nation of

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix B

Oklahoma appeals from the district court's entry of judgment in favor of defendant United States on its claim for a refund of federal wagering and occupational excise taxes which it alleges were unlawfully assessed against its pull-tab gaming activities pursuant to 26 U.S.C. §§ 4401 and 4411. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

The Choctaw Nation is a Native American Indian Tribe with its principal place of business in Durant, Oklahoma. The Choctaw Nation owns and operates a variety of businesses including gaming centers, tobacco shops, truck plazas, and convenience stores. As part of its gaming activities, the Choctaw Nation sells pull-tabs at its gaming centers and convenience stores.

A pull-tab is a two inch by four inch card or ticket containing five windows covered with tabs. Various symbols are found under the tabs. The face of the pull-tab discloses the combination of symbols that results in a winning ticket. To play a pull-tab, a player simply pulls back each tab and checks the symbols found under the tabs to ascertain whether he holds a winning ticket. Depending upon the point of sale, players can purchase pull-tabs from a clerk or directly from a dispensing machine. Each pull-tab typically costs between 25 cents and one dollar, and typically allows a player to win between 25 cents and $2500. If a player purchases a winning pull-tab, he can redeem the award by presenting the pull-tab to a cashier at one of the points of sale. Although players frequently present winning tickets for payment on the date of purchase, it is not uncommon for them to claim their awards later.

Appendix B

The Choctaw Nation purchases pull-tabs in series of 24,000 tickets. Each ticket in a series contains the same serial number. The ticket manufacturer prints each ticket in a series with a winning or losing combination of symbols. A fixed number of tickets in each series have a winning combination of symbols, and those tickets are distributed randomly throughout the series. It typically takes the Choctaw Nation more than one business day to sell an entire series of pull-tabs. Each pull-tab also indicates how many winners there will be in each series (e.g., four $500 winners, four $75 winners, etc.). Once all of the tickets in a series are sold to players, the series is officially closed and winning tickets are no longer honored.

In April 1996, the IRS assessed against the Choctaw Nation's pull-tab activities federal wagering excise taxes, 26 U.S.C. § 4401(a)(1), and accompanying federal occupational taxes, 26 U.S.C. § 4411, in the aggregate amount of $155,316.59. The Choctaw Nation paid a small portion ($2,582.95) of the taxes determined by the IRS to be due and owing, but immediately filed a claim for a refund of this amount with the IRS. The Choctaw Nation subsequently waived its right to a statutory notice of disallowance of its refund claim and filed this action for refund. The United States counterclaimed for (1) unpaid wagering excise taxes in the amount of $149,394.47, plus interest, and (2) unpaid occupational taxes in the amount of $3,339.17, plus interest. The parties eventually filed cross-motions for summary judgment, and, pursuant to those motions, the district court granted summary judgment in favor of the government.

Appendix B

II.

The issues raised on appeal by the Choctaw Nation are identical to those asserted by the Chickasaw Nation in the companion appeal. For the reasons stated in our opinion disposing of the companion appeal, we conclude the district court properly granted summary judgment in favor of the United States. In particular, we agree with the district court that (1) pull-tabs involve a taxable wager, as defined in 26 U.S.C. § 4421, (2) the Choctaw Nation is a "person" subject to federal wagering excise taxes (and the accompanying federal occupational taxes), (3) the Indian Gaming Regulatory Act does not preclude the gaming activities at issue from being subject to federal wagering excise taxes, and (4) the self-government guarantee of the 1855 treaty between the United States and the Choctaw Nation cannot reasonably be interpreted as providing the Choctaw Nation with an exemption from federal wagering excise taxes.

III.

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA IN *CHOCTAW NATION OF OKLAHOMA v. UNITED STATES* DATED AND FILED MARCH 31, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV-97-510-B

CHOCTAW NATION OF OKLAHOMA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER

This matter comes before the Court on Plaintiff's Motion for Summary Judgment filed on May 8, 1998 (Docket Entry #25), Defendant's Cross-Motion for Summary Judgment filed on June 5, 1998 (Docket Entry #34), Defendant's Brief in Opposition of Plaintiff's Motion for Summary Judgment filed on June 5, 1998 (Docket Entry #35), Plaintiff's Brief in Opposition to Defendant's Cross-Motion for Summary Judgment[1] filed on June 23, 1998 (Docket Entry #38) and

1. Although not indicated in the title, Plaintiff's Brief in Opposition to Defendant's Cross-Motion for Summary Judgment also serves as a reply brief in support of Plaintiff's Motion for Summary Judgment.

Defendant's Reply Brief in Support of United States' Cross-Motion for Summary Judgment filed on July 7, 1998 (Docket Entry #40). Upon review and consideration of these pleadings, this Court renders the ruling reflected herein.

Plaintiff commenced this action on September 5, 1997 seeking a refund of wagering excise taxes paid for the month of July 1993, plus interest, and an occupational tax paid for the year 1993, plus interest, relating to Plaintiff's sale of pull tab cards. These taxes were assessed pursuant to 26 U.S.C. § 4401 and § 4411. The entire sum of taxes paid by Plaintiff and for which Plaintiff herein seeks a refund is $2,582.95. In response to Plaintiff's Complaint, Defendant filed a Counterclaim seeking to recover from Plaintiff unpaid wagering excise taxes and unpaid occupational taxes assessed for the period from January 1, 1988 through December 31, 1994 in the aggregate sum of $152,733.64, plus interest.

In its motion papers, Plaintiff contends that the tax liabilities assessed by Defendant are unlawful for three reasons. First, Plaintiff contends that under federal common law and Internal Revenue Service's revenue rulings, Indian tribes are not federal taxable entities generally, and specifically, they are not included in the applicable definition of a "person" on whom Defendant imposed the taxes. Second, Plaintiff asserts that the taxation of pull tabs, a game expressly authorized for tribal self-sufficiency by Congress under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, is inconsistent with IGRA's treatment of taxation, IGRA's goal and purpose and IGRA's legislative history. Third, Plaintiff contends that a pull tab is not a "lottery" as defined by the Internal Revenue Code,

and thus, does not give rise to the tax liabilities imposed on Plaintiff in this case.

Defendant counters that Plaintiff is a taxable entity and that it is a "person" for whom wagering excise taxes and occupational taxes may be imposed. Defendant asserts that the imposition of wagering excise taxes and occupational taxes is neither inconsistent with the express language of IGRA nor is it inconsistent with Congress' intent in enacting IGRA. In addition, contrary to Plaintiff's assertions, Defendant contends that the term "lottery" under the Internal Revenue Code includes pull tab cards.

Under Federal Rule of Civil Procedure 56(c), summary judgment shall be granted if the record shows that, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510-11, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine

issue for trial. *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983).

Section 4401(a) of Title 26 of the United States Code imposes an excise tax on any wager authorized under the law of the state in which accepted. The excise tax is equal to 0.25 percent of the amount of the wager. 26 U.S.C. § 4401(a). Section 4401(c) provides that each person who is engaged in the business of accepting wagers shall be liable for and shall pay the excise tax on all wagers placed with him. In addition, it provides that each person who conducts any wagering pool or lottery shall be liable for and shall pay the excise tax on all wagers placed in such pool or lottery.

Section 4411(b) of Title 26 of the United States Code imposes an occupational tax of $50 per year to be paid by each person who is liable for the tax imposed under § 4401(a)(1).

Section 4421(1) of Title 26 of the United States Code defines the term "wager" in part as "any wager placed in a lottery conducted for profit." 26 U.S.C. § 4421(1)(C). Section 4421(2) provides that the term "lottery" includes the numbers game, policy, and similar types of wagering. It does not include any game in which usually "the wagers are placed, the winners are determined, and the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game." 26 U.S.C. § 4421(2)(A).

Section 7701(a)(1) of Title 26 of the United States Code defines "person" to "mean and include an individual, a trust, estate, partnership, association, company or corporation."

As stated, Plaintiff maintains that the wagering excise taxes and occupational taxes of § 4401 and § 4411 are not applicable to it because Indian tribes are not taxable entities and Indian tribal governments are not included within the definition of "person" under § 7701(a). This Court disagrees.

Indian tribes are taxable entities. Courts have recognized that Indians and Indian tribes are liable for excise taxes in the same way as other persons. *See*, *Confederated Tribes of the Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *Lac Courte Oreilles Chippewa Indians v. United States*, 845 F.2d 139 (7th Cir. 1988).

In support of its position that Indian tribes are not taxable entities, Plaintiff relies upon three Internal Revenue Service's revenue rulings, namely, Rev. Rul. 67-284, 1967-2 C.B. 55, Rev. Rul. 81-295, 1981-2 C.B. 16, and Rev. Rul. 94-16, 1994-1 C.B. 20. These revenue rulings are inapposite to the present case because they deal only with federal income taxes. They do not affect the application of other federal taxes to Indian tribes. Indeed, in Rev. Rul. 94-16, the Internal Revenue Service specifically states:

> This revenue ruling deals only with federal income taxes. It does not affect the application of other federal taxes, such as employment taxes and excise taxes (***including excise taxes on wagering***) to Indian tribes or tribal corporations. (Emphasis added).

In addition, the Internal Revenue Service's position in regard to excise taxes, at the time it declared in Rev. Rul. 67-284 that income tax statutes did not apply to Indian tribes, was that Indian tribes were subject to excise taxes. In Rev. Rul. 58-610, 1958-2 C.B. 815, the Internal Revenue Service concluded that the sale of an automobile to an Indian tribe for governmental or police purposes was subject to federal excise taxes. Rev. Rul. 67-284 does not speak to federal excise taxes. It therefore appears that the Internal Revenue Service's declaration applies only to federal income taxes.

Notwithstanding Plaintiff's arguments to the contrary, the Court concludes that Indian tribal governments fall within the definition of "person" under § 7701(a). The Court concludes that the list set forth in § 7701(a) is not exhaustive. *See*, 26 U.S.C. § 7701(c) ("The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."); *see also*, *Chemehuevi Indian Tribe v. California St. Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir.), *rev'd on different grounds*, 474 U.S. 9 (1985). If the list were exhaustive, a state and the United States (both of which, like Indian tribal governments, are defined in subsequent subsections of § 7701) would not qualify as "persons" under § 7701(a). However, as made clear by the Supreme Court in *Ohio v. Helvering*, 292 U.S. 360, 370 (1934), a state and the United States may qualify as a person within the definition of § 7701.

In addition, the Court is persuaded that Indian tribal governments are subject to excise taxes and fall within the

definition of "person" in light of the Indian Tribal Governmental Tax Status Act of 1982, codified as amended in 26 U.S.C. § 7871. Under the Act, Indian tribal governments are extended numerous tax advantages enjoyed by the states. Section 7871 provides in pertinent part:

> **(a) General rule.** An Indian tribal government shall be treated as a State —
>
> * * * *
>
> (2) . . . , for purposes of any exemption from, credit or refund of, or payment with respect to, an excise tax imposed by —
>
> (A) chapter 31 (relating to tax on special fuels),
>
> (B) chapter 32 (relating to manufacturers excise taxes),
>
> (C) subchapter B of chapter 33 (relating to communications excise tax), or
>
> (D) subchapter D of chapter 36 (relating to tax on use of certain highway vehicles . . . .

The Court opines that if Indian tribes governments were not subject to federal taxation, including excise taxes, and/or were not "persons" under § 7701(a), Congress would

not have enacted § 7871 so to treat Indian tribal governments as states for certain excise taxes.[2]

Because Indian tribal governments are "persons" under § 7701, the Court finds that they are subject to the wagering excise taxes and occupational taxes of § 4401 and § 4411.

In reaching its decision, the Court notes that despite its statement in Rev. Rul. 67-284 that Indian tribal governments are not taxable entities, the Internal Revenue Service has ruled that Indian tribal governments are in fact subject to wagering excise taxes and occupational taxes. In Rev. Rul. 94-81, 1994-2 C.B. 412, the Internal Revenue Service addressed the application of wagering excise taxes and occupational taxes to Indian tribal governments. Initially, the Internal Revenue Service stated that Indian tribal governments have no inherent exemption from federal excise taxation. It, however, acknowledged that § 7871 provided a limited exemption from certain excise taxes. Upon examining § 7871, the Internal Revenue Service found that wagering excise taxes and occupational taxes were not included in § 7871(a)(2). Consequently, the Internal Revenue Service concluded that Indian tribal governments were not to be

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2. Notably, Chapter 35 relating to wagering excise taxes is not included in § 7871. In addition, an excise tax exemption under § 7871 applies *only* if, in addition to any other requirement applicable to similar transactions involving a state or political subdivision, the transaction involves the exercise of an *essential governmental function* of the Indian tribal government. 26 U.S.C. § 7871(b). In *Little Six, Inc. v. United States*, __ Fed. Cl. __, 1999 WL 116031 (Fed. Cl. March 2, 1999), the district court found that tribal gaming was not an essential governmental function.

treated as states under § 7871 with respect to wagering taxes. Because § 7871(a)(2) did not apply, the Internal Revenue Service stated that a wager placed with a lottery conducted by an Indian tribal government would be subject to the taxes while the same wager placed with a lottery conducted by a state agency operating under state law would not be subject to tax.[3, 4]

In addition, the Court notes that United States Magistrate Judge James H. Payne in *Chickasaw Nation v. United States*, 1998 WL 975690 (E.D. Okla. Dec. 30, 1998) (Case No. CIV-97-511-P), recently addressed the same issues before the Court and concluded that Indian tribes are taxable entities and Indian tribal governments are "persons" under the Internal Revenue Code. The Court concurs in Magistrate Judge Payne's analysis on these issues.

In its briefing, Plaintiff argues that the taxation of pull tab gaming activities is inconsistent with IGRA's treatment of taxation, IGRA's goal and purpose and IGRA's legislative history. This Court again disagrees. Although IGRA only states that the provisions of the Internal Revenue Code

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3. Section 4402(3) of Title 26 of the United States Code exempts from taxation any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a state acting under the authority of state law, but only if the wager is placed with the state agency conducting the sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

4. Section 4402(3), like § 7871, does not provide for an exemption for wagers placed in a lottery conducted by an Indian tribal government.